BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BONITA M. WYNN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,007,338
THE BOEING COMPANY	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF THE STATE	)	
OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent appeals the September 17, 2007 Review and Modification Award of Administrative Law Judge John D. Clark. Claimant was awarded benefits for an 85.3 percent permanent partial disability based on a 70.6 percent task loss and a 100 percent wage loss. The Administrative Law Judge (ALJ) refused to apply the new method of computing bilateral upper extremity awards as set forth in *Casco*,[1] finding that the doctrine of res judicata applied to the original 6.2 percent whole body functional impairment contained in the agreed award of December 13, 2002, for the injuries suffered to claimant's upper extremities.

Claimant appeared by her attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric K. Kuhn of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Review and Modification Award of the ALJ. The Board heard oral argument on December 4, 2007.

---

[1] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

ISSUES

1. Have claimant's circumstances changed and has his disability increased sufficient to justify granting claimant a permanent partial work disability under K.S.A. 44-528 and K.S.A. 44-510e? Or is claimant's increase in disability, if proven, the result of a new accident or series of accidents, suffered while working for respondent?

2. If claimant's injuries and disability have increased from the original injuries, what is the nature and extent of those increased injuries and disability?

3. Should the law as set forth in *Casco* be applied to this situation so as to limit claimant's award to two scheduled injuries? Claimant argues that res judicata, equitable estoppel or "law of the case" would act to prevent respondent from modifying the original agreed running award, which determined that claimant had suffered a 6.2 percent permanent partial impairment of function to the whole body. Respondent argues that none of the above legal principles are applicable to this situation, and claimant's award should be reduced to two scheduled injuries under *Casco*.

FINDINGS OF FACT

Claimant began working for respondent in January 1988. Claimant originally suffered accidental injuries while working for respondent, with an agreed date of accident of October 24, 2001. This matter was settled by a settlement hearing before Special Administrative Law Judge (SALJ) John C. Nodgaard on December 13, 2002. The settlement was based on the 6.2 percent body as a whole personal impairment rating provided by J. Mark Melhorn, M.D., for an injury to claimant's upper extremities. That was the only medical opinion attached to the Work Sheet For Settlements which was provided to the SALJ at the settlement hearing. The settlement was in the form of a running award and left open claimant's right to future medical treatment and review and modification of the Award.

After the accident, claimant returned to work for respondent at an accommodated position in material processing, basically a desk job. This lasted a few months, until claimant was laid off. A short time later, in September 2002, she returned to work with respondent as a factory service attendant, where she remained until her most recent layoff on June 16, 2005. Claimant's actual last day worked was on May 16, 2005, but she was

paid through June 16, 2005. The factory service attendant job also accommodated claimant's restrictions.

Because of her layoff, claimant filed an Application For Review And Modification on December 12, 2006, seeking an increase in her award from the prior functional impairment to include a permanent partial work disability. Respondent, on May 30, 2007, also filed an Application For Review And Modification, requesting a decrease in the original award, arguing the award was excessive and claimant's disability had decreased.

After her layoff, claimant continued to look for work for about one year. She applied at aircraft plants, including Cessna, Learjet, and Raytheon, looking for desk jobs within her restrictions. She also applied at other companies but was offered no employment. After a year, claimant ceased looking for a job and applied for Social Security disability. Claimant was awarded benefits and began receiving disability payments on June 1, 2007. The award of Social Security disability benefits was due to claimant's ongoing chronic illnesses, one of which was identified as Sjogren's. Claimant's other chronic illness was not identified, and this record contains no explanation as to the severity of claimant's condition or what Sjogren's entails.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist George G. Fluter, M.D., for an examination on December 21, 2006. Dr. Fluter diagnosed claimant with post bilateral carpal tunnel syndrome releases, right and left medial and lateral epicondylitis and pain in the right upper shoulder and shoulder girdle, the results of many years working for respondent. He noted that after claimant's return to respondent in September 2002, her condition continued to worsen. Dr. Fluter rated claimant at 19 percent to the right upper extremity which converts to a 12 percent whole body rating, and 21 percent to the left upper extremity which converts to a 13 percent whole body rating. The whole body ratings combine for a 23 percent whole person impairment.

Dr. Fluter limited claimant's lifting, carrying, pushing and pulling to 20 pounds occasionally and 10 pounds frequently. He also recommended thermal protection for claimant's hands when working in cold environments and restricted overhead work with the right hand to occasional. Dr. Fluter acknowledged that when claimant returned to work with respondent in September 2002, she suffered additional injuries. Her condition was aggravated and made worse by her job duties. Her condition was worsened by the repetitive movements still required of her at her job. Dr. Fluter did not, however, apportion his impairment ratings or restrictions between claimant's conditions in October 2001 and her injuries suffered from September 2002 through May 2005.

Dr. Fluter was provided a task list created by vocational expert Doug Lindahl. Of the 17 tasks on the list, Dr. Fluter determined claimant was no longer able to perform 12 for a task loss of 70.6 percent. This is the only task loss opinion contained in this record.

Claimant was referred by Administrative Law Judge John D. Clark to board certified orthopedic surgeon Pat D. Do, M.D., for an independent medical examination (IME) on March 30, 2007. Dr. Do found claimant to be post status bilateral carpal tunnel syndrome surgery, with right shoulder pain, status post right rotator cuff repair, and status post right ulnar nerve decompression, with left shoulder pain.

With respect to claimant's impairment rating, Dr. Do found claimant to have previously suffered an approximate 6 percent whole body functional impairment rating similar to that earlier determined by Dr. Melhorn for the bilateral carpal tunnel syndrome. Dr. Do also found that claimant had suffered an additional 17 percent whole body functional impairment as the result of her return to work with respondent in and after September 2002. He determined it was claimant's right ulnar nerve and right and left shoulder conditions which worsened with claimant's return to work. He was unable to say that claimant's worsening condition was the natural and probable consequence of her earlier injuries. He also opined that the ulnar nerve and shoulder conditions were completely separate from the bilateral carpal tunnel syndrome.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

---

[2] K.S.A. 44-501 and K.S.A. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 44-501(a).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

K.S.A. 44-528, the review and modification statute, allows for a modification of an award if,

> . . . the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished . . . .[6]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[7]

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.[8]

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.[9]

---

[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] K.S.A. 44-528(a).

[7] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[8] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[9] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

Claimant originally suffered accidental injuries to her upper extremities in 2001, when she developed bilateral carpal tunnel syndrome from her work duties with respondent. These injuries were settled by a running award before the SALJ based on Dr. Melhorn's 6.2 percent whole body impairment. Claimant then returned to work for respondent at accommodated positions, which aggravated her prior conditions and caused additional injuries to her upper extremities. The first issue for consideration is whether the injuries to claimant's ulnar nerve and shoulders are the natural and probable consequence of the original injuries to claimant's upper extremities or are new injuries resulting from claimant's return to work for respondent. Both Dr. Fluter and Dr. Do recognized claimant's preexisting carpal tunnel syndrome. Both also found claimant to have suffered additional injuries to her upper extremities. Both also opined that claimant's new injuries were the result of claimant's work activities after her return to work in September 2002. These opinions, that claimant suffered an aggravation and was made worse with her return to work, are fully supported by this record.

There is no medical testimony to support a finding that claimant's new injuries are the natural and probable consequence of her earlier bilateral carpal tunnel syndrome. There is medical evidence supporting a finding that claimant returned to work and suffered an aggravation of her previous injuries and new injuries to her elbows and shoulders, with a date of accident through a series of accidents culminating on claimant's last day worked, May 16, 2005.

When dealing with a series of injuries which occur microscopically over a period of time, the Kansas appellate courts have established a bright line rule for identifying the date of injury in a repetitive, microtrauma situation. The date of injury for repetitive injuries in Kansas has been determined to be either the last day worked or the last day before the claimant's job is substantially changed.[10]

The Board finds that claimant returned to work with respondent and suffered an aggravation of her prior conditions and a series of new injuries culminating on her last day worked with respondent. However, it does not appear a claim for compensation alleging a new series of accidents through claimant's last day worked was ever filed with the Kansas Division of Workers Compensation. Even if one was, that docketed claim is not before the Board.

The Board must next consider the nature and extent of claimant's injuries. Respondent contends that, as claimant's injuries are limited to her upper extremities, the award should be calculated based on the new calculation method determined by the

---

[10] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

Kansas Supreme Court in *Casco*. Respondent argues that the original determination of claimant's injuries contained in the running award should be modified to limit claimant's award to two scheduled injuries, rather than the original 6.2 percent whole body impairment.

In *Casco*, the Court was asked to consider the appropriate method of calculating an award when dealing with injuries to parallel extremities. In a lengthy and detailed analysis, the Court overturned over 70 years of case law precedent and held that there was a rebuttable presumption of permanent total disability when dealing with injuries to both eyes, both hands, both arms, both feet, or both legs, or any combination thereof. But if the presumption of permanent total disability is rebutted, then the claimant's award must be calculated as separate scheduled injuries under K.S.A. 44-510d.

Claimant contends that *Casco* cannot be applied, based on the doctrines of equitable estoppel, res judicata and law of the case. Kansas has applied the doctrine of equitable estoppel in workers' compensation proceedings.[11] In *Marley*, the Kansas Court of Appeals held a claimant to the terms of his written agreement with respondent by finding claimant was estopped from denying he was an independent contractor.

> The doctrine of equitable estoppel requires consistency of conduct, and a litigant is estopped and precluded from maintaining an attitude with reference to a transaction wholly inconsistent with his or her previous acts and business connections with such transaction.[12]

However, "one who asserts an estoppel must show some change in position in reliance on the adversary's misleading statement. . . ."[13]

> A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts . . . .[14]

---

[11] *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421 (2000).

[12] *Marley* at Syl. ¶ 1.

[13] *In re Morgan*, 219 Kan. 136, 546 P.2d 1394 (1976).

[14] *United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc.*, 221 Kan. 523, 527, 561 P.2d 792 (1977).

In this instance, claimant and respondent settled this matter before the SALJ for a 6.2 percent impairment to the body under K.S.A. 44-510e. Claimant, at that time, was unrepresented by counsel. She was advised that review and modification of her award was possible if her "physical condition materially changes or if your work status with The Boeing Company would change . . . ."[15] There was no mention by either the SALJ or by respondent's attorney that the 6.2 percent award could, in any way, be reduced. It is not permissible for respondent to change its position to take advantage of case law not only not in existence at the time of the settlement, but not even contemplated. The law does not permit such inconsistency in positions, and the doctrine of equitable estoppel may be employed to enforce this principle.

Claimant also contends that the doctrine of res judicata would bar any reconsideration of claimant's 6.2 percent impairment to the whole body. Res judicata is a well settled rule or doctrine which states "that when a matter in issue has once been determined it is not subject to a redetermination; that it is entitled to the recognition of permanence and constancy always accorded a judgment."[16]

K.S.A. 44-528(a)(d) states:

> Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.[17]

Respondent alleges the 6.2 percent impairment to the body used to settle this matter before the SALJ should be modified to two scheduled injuries pursuant to the Supreme Court's decision in *Casco*. The Court, in *Casco*, clarified prior interpretations of the Kansas Workers Compensation Act, ruling that bilateral extremity injuries should be compensated as separate scheduled injuries and not to the body as a whole. The law did not change, only the way the existing law is interpreted. In this case, there was an agreement at the time of the settlement that claimant had a 6.2 percent impairment to the whole body. That Award was not appealed. That is a finding of a past fact which existed at the time of the original settlement. It became final for want of an appeal and is not

---

[15] S.H. Trans. at 6.

[16] *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 395, 510 P.2d 1190 (1973).

[17] K.S.A. 44-528(a)(d).

subject to a redetermination. Res judicata applies to the determination that claimant's impairment is to the body as a whole.

The final legal principle applicable in the present circumstance is "the law of the case".

> [t]he doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so. This rule of practice promotes the finality and efficiency of the judicial process.[18]

Respondent, in effect, is asking that the decision in *Casco* be applied retroactively to this situation. It has long been recognized that an appellate court has the power to give a decision prospective application without offending constitutional principles.[19] The Kansas Supreme Court has recognized five factors commonly relied on by courts in determining the retroactivity question:

> (1) Justifiable reliance on the earlier law; (2) The nature and purpose of the overruling decision; (3) *Res judicata*; (4) Vested rights, if any, which may have accrued by reason of the earlier law; and [(5)] The effect retroactive application may have on the administration of justice in the courts.[20]

The Kansas Supreme Court has dealt with the question of the retroactive application of a newly announced rule or decision such as *Casco*. In *Henry*,[21] the Court declared the Kansas guest statute, K.S.A. 8-122b, to be,

> . . . unconstitutional and void as a denial of equal protection of the law under the Fourteenth Amendment to the United States Constitution and Sections 1 and 2 of the Kansas Bill of Rights for the reason that the classifications provided in that statute are arbitrary and discriminatory and have no rational basis.[22]

---

[18] *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 79, 150 P.3d 892 (2007); citing *State v. Collier*, 263 Kan. 629, Syl. ¶ 2, 952 P.2d 1326 (1998).

[19] *Troughton v. Troughton*, 3 Kan. App. 2d 395, 595 P.2d 1141 (1979).

[20] *Vaughn v. Murray*, 214 Kan. 456, 464, 521 P.2d 262 (1974).

[21] *Henry v. Bauder*, 213 Kan. 751, 518 P. 2d 362 (1974).

[22] *Henry* at Syl. ¶ 3.

Prior to *Henry*, Kansas law dealing with the guest statute required that a person, riding as a guest in a motor vehicle, must prove gross and wanton negligence to maintain a cause of action against the driver for any injuries, death or damage suffered by the guest. By finding the guest statute unconstitutional, the Court allowed a guest in a motor vehicle to maintain a cause of action based on ordinary negligence. At the time *Henry* was being decided, the Kansas Supreme Court was also considering the matter in *Vaughn*. In *Vaughn*, the Court stated that "it can safely be said, retroactive operation of an overruling decision is neither required nor prohibited."[23]

The options available to a court making a prospective-retroactive choice have been categorized by our court as four:

> (1) Purely prospective application where the law declared will not even apply to the parties to the overruling case; (cites omitted); (2) Limited retroactive effect where the law declared will govern the rights of the parties to the overruling case but in all other cases will be applied prospectively; (cites omitted); (3) General retroactive effect governing the rights of the parties to the overruling case and to all pending and future cases unless further litigation is barred by statutes of limitation or jurisdictional rules of appellate procedure; (cites omitted); and (4) Retroactive effect governing the rights of the parties to the overruling case and to other cases pending when the overruling case was decided and all future cases, but limited so the new law will not govern the rights of parties to cases terminated by a judgment or verdict before the overruling decision was announced. (Cites omitted.)[24]

The Court, in *Vaughn*, refused to apply, retroactively, the decision in *Henry* due to the fact the constitutional question had not been raised in *Vaughn* until the matter was before the Supreme Court. The Court ruled that a constitutional challenge to a legislative act would not be entertained on appeal unless the challenge had been alleged in the pleadings or presented to the trial court. The Court, however, went on to find the trial court had committed reversible error under the prior law, and the matter was remanded for a new

---

[23] *Vaughn* at 464.

[24] *Vaughn* at 465-66.

trial. The Court stated the new trial would be "conducted under the law as now declared", pursuant to *Henry*. The Court also stated that,

> We desire to give finality to those cases which have been presented to and determined by the trial courts of this state and the cases have terminated in judgments or verdicts without reversible error under the law then existing.[25]

The Board finds, for the above reasons, that respondent's request to review and modify and thus reduce the 6.2 percent impairment to the body as agreed to at the settlement of this matter, pursuant to *Casco*, must be denied because the original determination that claimant's injuries constitute a general body disability was not appealed and, therefore, is the law of the case.

With regard to claimant's request for review and modification of this matter, the Board finds that claimant's functional impairment remains at 6.2 percent for the above stated reasons. The Board finds that claimant's disability has increased as the result of a series of microtrauma injuries through her last day worked. However, whether or not such a claim for a new series of accidents was filed, that injury or series of injuries is not before the Board on this appeal. The Board does not have jurisdiction to determine an award for injuries not properly filed with the Division of Workers Compensation.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the original Award of the Special Administrative Law Judge should not be modified from the 6.2 percent permanent partial disability awarded for the injuries suffered on October 24, 2001. The Board does not have the jurisdiction to determine the disability resulting from the subsequent series nor to enter any other award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review and Modification Award of Administrative Law Judge John D. Clark dated September 17, 2007, should be, and is hereby, reversed and modification of the December 13, 2002 agreed award is denied.

---

[25] *Vaughn* at 466.

IT IS SO ORDERED.

Dated this ____ day of February, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge